MILLER & VAN EATON
P. L. L. C.

MATTHEW C. AMES
KENNETH A. BRUNETTI*
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN
WILLIAM L. LOWERY
NICHOLAS P. MILLER
MATTHEW K. SCHETTENHELM
JOSEPH VAN EATON

*Admitted to Practice in California Only

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
400 MONTGOMERY STREET
SUITE 501
SAN FRANCISCO, CALIFORNIA 94104-1215
TELEPHONE (415) 477-3650
FAX (415) 477-3652

WWW.MILLERVANEATON.COM

OF COUNSEL:
JAMES R. HOBSON
NANNETTE M. WINTER†
GERARD L. LEDERER
WILLIAM R. MALONE
JOHN F. NOBLE

†Admitted to Practice in New Mexico Only

January 11, 2006

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Cellular early termination fees, WT Dockets 05-193, 05-194
Ex parte communication pursuant to Section 1.1206 of the Rules.

Dear Ms. Dortch:

This letter is submitted on behalf of commenting parties Wireless Consumers Alliance, Porsha Meoli, Leslie Armstrong, Sridhar Krishnan, Astrid Mendoza, Christina Nguyen, Bruce Gatton, Margaret Schwarz, Kathryn Zill, Mark Lyons, Richard Samko and Amanda Selby (hereinafter collectively referred to as "WCA") to address the recent case of *Cellco Partnership v. Hatch*, 2005 U.S. App. LEXIS 26887 at *14-*15 (8th Cir. December 9, 2005). We understand that certain of the Petitioners have argued to the Commission, in *ex parte* presentations, that *Hatch* supports their contention that 47 U.S.C. § 332 preempts any and all state-law claims that challenge in any respect the validity or enforceability of any early termination fee charged by a cellphone carrier. In *Hatch,* the United States Court of Appeals for the Eighth Circuit held that a state statute, Minn. Stat. § 325F.695, was preempted by § 332.[1] However, *Hatch* does not in any way support the relief that Petitioners are seeking from the Commission.

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[1] A copy of the *Hatch* decision is attached hereto as Exhibit A.

The statute invalidated in *Hatch* required providers of wireless telecommunications services to give 60 days' advance written notice of any change to a subscriber contract that "could result" in increased rates or an extended contract term (Minn. Stat. § 325F.695, subds. 1(a)-(c) & 3), and provided that such contractual changes would be ineffective for any wireless subscriber who had not affirmatively assented to them. *Id.*, subd. 4.[2] The Court held that the statute was preempted for two reasons.

First, the Court found that the statute's 60-day notice provision would freeze any proposed rate increase until the expiration of the 60-day period, or at least until the carrier had given notice of its intention to increase rates and the subscriber had agreed to be subject to the rate hike. Thus, under the statute, any carrier that wanted to increase its rates would have to, at a minimum, <u>postpone</u> doing so, and would not even be <u>able</u> to implement a rate increase unless and until the customer agreed to accept the increased rates. This, the Court of Appeals held, constituted direct regulation of subscriber rates by the State that is preempted under § 332. *Cellco Partnership v. Hatch*, 2005 U.S. App. LEXIS 26887 at *14-*15 (8th Cir. December 9, 2005).

Furthermore, the Court pointed out that

> …the statute goes far beyond the traditional requirements of contract law, and thus falls outside the scope of the "neutral application of state contractual or consumer fraud laws," which the FCC has said is permissible state regulation of wireless providers. This statute effectively voids the terms of contracts currently used by providers in one industry, and substitutes by statute a different contractual arrangement.

Id at *15-*16.

Hatch provides no support for Petitioners' position in these proceedings. The Minnesota statute that the Court struck down in *Hatch* explicitly attempted to delay or, absent written assent by the customer, to prevent, "increase[s] in the charge[s]" to wireless consumers. Minn. Stats. § 325F.695, subd. 1(d). The pending state-court cases that challenge cellphone carriers' early termination fees ("ETFs"), unlike the Minnesota statute, <u>do not</u> regulate or seek to regulate the rates charged to consumers, directly or indirectly.

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[2] A copy of Minn. Stat § 325F.695 is attached hereto as Exhibit B.

Furthermore, unlike the Minnesota statute in *Hatch*, the state laws on which the pending challenges to ETFs are based are contractual and consumer protection provisions of general applicability that do not single out wireless carriers or wireless contracts for special treatment. Thus, the pending California ETF actions rely on a state statute that sets forth the criteria that must be met for liquidated damages provisions in consumer contracts generally to be deemed enforceable under California law. California Civil Code § 1671. The California actions and the actions pending in Florida and Illinois also assert claims under state statutes that generally prohibit unfair, oppressive or deceptive business practices.[3] Unlike the Minnesota statute invalidated in *Hatch*, these statutes apply across the board to all businesses; they are not limited to wireless telecommunications providers. Thus, while the Minnesota statute addresses only the wireless industry, the state-court ETF cases simply seek to apply neutral state contract and consumer protection laws that apply to everyone. As the Commission has repeatedly held, such laws are not preempted by § 332. *Southwestern Bell Mobile Sys.*, 14 FCC Rcd 19898, 19903 (¶ 10) (1999). *See Wireless Consumers Alliance Inc.*, 15 FCC Rcd 17021, 17025 (¶ 8) (2000), *recon. denied*, 16 FCC Rcd 5618 (2001).

An *amicus curiae* brief that the Commission submitted in *Hatch*, urging the result that the court ultimately adopted, underscores this point.[4] In its *amicus* brief, the Commission argued:

> The Commission has … determined that section 332(c)(3)(A) does not preempt "the neutral application of state contractual or consumer fraud laws." *Southwestern Bell Mobile Sys.*, 14 FCC Rcd , 19903 (¶ 10). *See Wireless Consumers Alliance Inc.*, 15 FCC Rcd , 17025 (¶ 8); *In the Matter of Petition of the State Indep. Alliance*, 17 FCC Rcd 14802, 19821 n.119 (2002). [The Minnesota statute] cannot fairly be characterized as a generally applicable law of that sort. The statute addresses only CMRS service, and the statutory restrictions are limited in scope to changes that "could result in an increase to the charge to the customer." Because the statutory restrictions apply only to rate increases in CMRS contracts, these restrictions "fall … more heavily on CMRS providers than on any other business. *Wireless Consumers Alliance Inc.*, 15 FCC Rcd at 17034 (¶ 24). [The Minnesota statute] thus is outside the scope of consumer fraud or contract laws of general application.

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[3] California Business & Professions Code § 17200 *et seq.*; the Consumer Legal Remedies Act, California Civil Code § 1750 *et seq.*; the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*; and the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq*.

[4] The Commission's *amicus* brief is attached hereto as Exhibit C.

FCC Amicus Brief, Exhibit C hereto, at 21.

In sum, the factors that led the Court in *Hatch* to hold that Minn. Stat. §325F.695 is preempted by § 332 simply do not apply to the pending actions challenging wireless carriers' ETFs or the state laws on which those actions are based. Accordingly, *Hatch* is no help to Petitioners. Indeed, the FCC's *amicus* brief in *Hatch* re-affirms what WCA has argued in these proceedings from their inception – that the relief Petitioners seek is foreclosed by long-standing Commission authority holding that § 332 does not preempt the application of neutral state laws of general applicability, such as those on which the pending ETF cases rely.

Sincerely,

James R. Hobson

One of the counsel for
Wireless Consumer Alliance et al.

EXHIBIT B

Chapter 325F. Consumer Protection; Products and Sales
Prevention of Consumer Fraud

➡**325F.695. Consumer protections for wireless customers**

Subdivision 1. Definitions. The definitions in this subdivision apply to this section.

(a) "Contract" means an oral or written agreement of definite duration between a provider and a customer, detailing the wireless telecommunications services to be provided to the customer and the terms and conditions for provision of those services.

(b) "Wireless telecommunications services" means commercial mobile radio services as defined in Code of Federal Regulations, title 47, part 20.

(c) "Provider" means a provider of wireless telecommunications services.

(d) "Substantive change" means a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract. "Substantive change" includes a modification in the provider's administration of an existing contract term or condition. A price increase that includes only the actual amount of any increase in taxes or fees, which the government requires the provider to impose upon the customer, is not a substantive change for purposes of this section.

Subd. 2. Copy of contract. A provider must provide each customer with a written copy of the customer's contract between the provider and the customer within 15 days of the date the contract is entered into. The provider may meet the requirement to provide a written copy of the contract by providing an electronic copy of the contract at the customer's request. A provider must maintain verification that the customer accepted the terms of the contract for the duration of the contract period.

Subd. 3. Provider-initiated substantive change. A provider must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Subd. 4. Customer-initiated change. If the customer proposes to the provider any change in the terms of an existing contract, the provider must clearly disclose to the customer orally or electronically any substantive change to the existing contract terms that would result from the customer's proposed change. The customer's proposed change is only effective if the provider agrees to the proposed change and the customer agrees to any resulting changes in the contract. The provider must maintain recorded or electronic verification of the disclosure for the duration of the contract period.

Subd. 5. Expiration. This section expires August 1, 2007.